SEP 22 1989

JOSEPH F. [illegible] JR.
CLERK

NO. 88-2032

in the

Supreme Court

of the

United States

NICHOLAS H. MORLEY; INTERTERRA, INC.,
a Delaware corporation;
REGINA INTERIORS, INCORPORATED,
a Florida corporation; and
CITY NATIONAL BANK OF MIAMI,
a national bank, as Trustee of a land trust known on the Trustee's records as Trust No. 5003138,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY

A. *The Conflict*

Contrary to the FDIC's view that this is a counterclaim attack on the FDIC's statutory powers (see argument below), this case does not turn on any counterclaim. The FDIC put its statutory powers into issue by asserting that it acquired Petitioners' loan under § 1823(c). That assertion was necessary in order for the FDIC to raise the § 1823(e) shield, which does not otherwise apply. Petitioners denied that the loan was acquired under § 1823(c). The FDIC does not contest that if Petitioners are correct, the § 1823(e) shield is unavailable; however, it maintains the Petitioners do not have standing to deny that the loan was so acquired. More particularly, the FDIC argues that Petitioners have no standing to deny FDIC allegations which were necessary in order for it to proceed with its case.

Nevertheless the FDIC recognizes the standing question posed by the Petitioners is substantial. It acknowledges that the decision below conflicts with two-thirds of this Court's standing analysis. The FDIC notes:

> Because the fair traceability component of Article III standing is not satisfied, the court of appeals' more problematic rulings regarding the injury-in-fact and redressability components were not necessary to its constitutional holding.
>
> Brief in Opposition, p.9, n.6.

Thus in its subtle way, the FDIC concedes conflict between this Court's cases and the decision below with regard to injury-in-fact: The Petitioners are injured by not being able to raise lawful defenses. The FDIC similarly concedes conflict with regard to redressability: If the loan was not acquired

under § 1823(c), then the immediate injury (loss of defenses pursuant to § 1823(e)) would be redressed by a decision saying the loan was not acquired under § 1823(c).

Consequently, only the "fairly traceable" component seems to prevent Petitioners from a clean sweep conflict on standing, even in the FDIC's view.

Fairly analyzed, the decision below also presents "fairly traceable" conflict. There is a nothing speculative about whether a loan was taken or not taken under § 1823(c), and the consequent availability or non-availability of defenses. The connection is direct. If a loan is taken under § 1823(c), then § 1823(e) provides a shield to the Petitioners' defenses. Simply put, if the Petitioners' loan was not taken under § 1823(c), the loss of defenses "fairly can be traced to the challenged action. . . ." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1978). The challenged action is the FDIC's assertion of a statutory protection to which it may not be entitled.

B. *The FDIC Fails to Finesse Fairly Traceable*

The FDIC's tack is to load the question presented with non-issues. It states the question to be "[w]hether the court of appeals correctly held that debtors of the assisted institution lacked standing *to challenge the statutory basis for the assistance plan.*" Brief in Opposition, p.I (emphasis supplied).

But the certiorari petition in this case does not present a question of a statutory challenge to the validity of the Federal Deposit Insurance Corporation's assistance plan to Continental Illinois National Bank and Trust Company of Chicago. The petition does not present any questions regarding any "alleged illegality" in the assistance plan. Brief in Opposition, p.8. The petition does not present the

question of whether the FDIC actions were "allegedly in excess of [its] authority." Brief in Opposition, p.7. The petition does not present a factual question of whether the assistance plan was composed of parts which could be separated, and thus saved from illegality. Brief in Opposition, p.8.[1]

Those arguments intentionally miss the point of the petition. The issue is not standing to challenge the Continental bail out; the issue is whether the Petitioners have standing to deny the allegation that this loan was acquired under Section 1823(c). The answer to that ultimate question is simply yes or no. The answer poses no danger to ordered liberty in the banking world. An ultimate yes only leads to a right to present defenses. An ultimate no means no right to present defenses.

Saying the Petitioners have no right to question the FDIC's assertion poses a danger to liberty. That conclusion places the FDIC's assertions beyond judicial inquiry, making standing a synonym for silencing a citizen's right to ask a fair question. Not even a national banking problem requires that oppressive result.

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[1]By arguing divisibility, the FDIC raises a factual issue which relates to the merits, not standing, and which, on its merits, favors the Petitioners. The notice of special meeting of Continental shareholders called them to meet. . .

> (1) To consider and act upon a plan (the "Plan") providing for assistance to Continental Illinois National Bank and Trust Company of Chicago (the "Bank") and a restructuring of CI Corp. which includes the following elements, *each of which is an integral part of a single plan* . . . (emphasis supplied).

Respectfully submitted,

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September 21, 1989